Mensa Mercantile (Far East) Pte Ltd v Eikobina (M) Sdn Bhd & Ors

HIGH COURT (JOHORE BAHRU) — SUIT NO 22-378 OF 1988
RICHARD TALALLA JC
28 NOVEMBER 1990

Civil Procedure — Pleadings — Striking out — Estoppel per rem judicatam — Issue determined in earlier action against different defendant — Failure of plaintiff to add defendant in second action as defendant in first action — Privity of interest between defendants in the first and second actions

Civil Procedure — Estoppel — Res judicata — Privity of party to proceedings — Privity of interest

The plaintiff company had an action against the defendant, Eikobina Sdn Bhd ('Eikobina'), in the High Court at Kuala Lumpur ('the first action') for, inter alia, specific performance of an agreement to sell certain equipment. At the trial of the first action, the evidence was produced by the first defendant that the defendant had sold the equipment to Edogawa Shuseki Centre Co Ltd ('Edogawa'). The defendant's director also testified in court that the equipment belonged to Fuji Sangyo Pte Ltd ('Fuji'), and that he was the owner of these companies, and a major shareholder of Edogawa. Evidence was also given by the plaintiff's chief executive officer at the trial confirming that the defendant's solicitors had informed him of the sale to Edogawa, and that he had made a company search and discovered that the directors of Edogawa were the same as the directors of Eikobina. The learned judge gave judgment in the first action on 2 February 1989 and found that Eikobina had breached the agreement and awarded damages to the plaintiff (see [1989] 2 MLJ 170; and on appeal [1989] 3 MLJ xlix).

On 19 November 1988 in the Johore Bahru High Court the plaintiff commenced this action ('second action') against Eikobina, Fuji and Edogawa, alleging that the defendant, Eikobina, purported to sell the equipment to Edogawa, the third defendant, with the fraudulent intention or purpose of preventing the plaintiff from enforcing specific performance against Eikobina, the first defendant, and that all the three defendants, viz Eikobina, Fuji and Edogawa, had conspired to cheat or deceive. The plaintiff claimed in this action an injunction restraining the three defendants by themselves, their servants or agents from moving the equipment from their location in Malaysia and a declaration that the agreement and sale of the equipment was null and void, and damages for conspiracy. The defendants sought to set aside the writ and statement of claim, claiming that this action was res judicata in the wider sense.

Held, allowing the defendants' application :

(1) For the doctrine of issue estoppel to apply there must also be privity of interest between the defendant in the first action and the defendants in this action.

(2) Even where res judicata is not strictly established or where estoppel per rem judicatam has not been sufficiently established as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action.

(3) Upon the evidence led in the first action and the evidence in this action and particularly in view of the fact that the plaintiff's chief executive officer knew that the equipment had been transferred to the third defendant, Edogawa, and the directors of the two companies were the same, there is privity of interest between the defendants in this action and Eikobina, the defendant in the first action. It was clear that the plaintiff at the time material to the first action knew of the nexus between Eikobina and the defendants in this action and by exercising reasonable diligence could have sought in the first action the relief it was claiming in this action. Therefore, the plaintiff should be precluded from bringing this action.

[Bahasa Malaysia summary

Syarikat plaintif ada satu tindakan terhadap defendan, Eikobina Sdn Bhd ('Eikobina'), dalam Mahkamah Tinggi di Kuala Lumpur (tindakan pertama') bagi antara lainnya, perlaksanaan spesifik suatu perjanjian untuk menjual sesuatu peralatan. Pada perbicaraan tindakan pertama, keterangan telah dikemukakan oleh defendan pertama bahawa defendan telah menjual peralatan itu kepada Edogawa Shuseki Centre Co Ltd ('Edogawa'). Pengarah defendan juga memberi keterangan dalam mahkamah bahawa peralatan itu dipunyai oleh Fuji Sangyo Pte Ltd ('Fuji'), dan bahawa dia adalah tuanpunya syarikat-syarikat tersebut, dan seorang pemegang syer utama Edogawa. Keterangan juga adalah diberi oleh ketua pegawai eksekutif plantif di perbicaraan mengesahkan bahawa peguamcara defendan telah memberitahunya tentang jualan itu kepada Edogawa, dan bahawa dia telah membuat suatu carian syarikat dan mendapati bahawa pengarah-pengarah Edogawa adalah sama seperti pengarah-pengarah Eikobina. Yang arif hakim memberi penghakiman dalam tindakan pertama pada 2 Februari 1989 dan mendapati bahawa Eikobina telah memungkiri perjanjian dan award gantirugi kepada plaintif. (Lihat [1989] 2 MLJ 170; dan pada rayuan [1989] 3 MLJ xlix.)

Pada 19 November 1988 di Mahkamah Tinggi Johore Bahru, plaintif memulakan tindakan ini ('tindakan kedua') terhadap Eikobina, Fuji dan Edogawa, mengatakan bahawa defendan, Eikobina, dikatakan menjual peralatan itu kepada Edogawa, defendan ketiga, dengan niat fraud atau tujuan menghalang plaintif daripada menguatkuasakan perlaksanaan spesifik terhadap Eikobina, defendan pertama, dan bahawa kesemua tiga defendan, iaitu, Eikobina, Fuji dan Edogawa, telah berkomplot unutk menipu atau memperdaya. Plaintif menuntut di bawah tindakan ini suatu injunksi menyekat ketiga-tiga defendan oleh dirinya sendiri, agen atau orang gajinya daripada memindah peralatan daripada lokasi dalam Malaysia dan satu deklarasi bahawa perjanjian dan jualan peralatan adalah batal dan tak sah, dan gantirugi untuk komplok itu. Defendan-defendan juga memohon untuk mengenepikan writ dan pernyataan tuntutan, mendakwa bahawa tindakan ini adalah res judicata dalam makna yang lebih luas.

Diputuskan, meluluskan permohonan defendan-defendan:

(1) Bagi doktrin isu estopel dipakai, mestilah wujudnya juga priviti kepentingan antara defendan dalam tindakan pertama dan defendan-defendan dalam tindakan ini.

(2) Walaupun di mana res judicata tidak ditubuhkan secara tegas atau di mana estopel per rem judicatam tidak ditubuhkan secara mencukupi supaya menjadikan sebarang penimbulan semula persoalan-persoalan yang telah dihukumkan itu satu skandal dan penyalahgunaan, mahkamah tidak akan was-was untuk menolak tindakan.

(3) Atas keterangan yang dikemukakan dalam tindakan pertama dan keterangan dalam tindakan ini dan secara khususnya, memandangkan fakta bahawa ketua pegawai eksekutif plaintif tahu bahawa peralatan telah dipindah kepada defendan ketiga, Edogawa, dan pengarah-pengarah keduadua syarikat adalah sama, terdapatnya priviti kepentingan

antara defendan-defendan dalam tindakan ini dan Eikobina, defendan dalam tindakan pertama. Adalah jelas bahawa plaintif telah pada masa material kepada tindakan pertama tahu tentang perkaitan antara Eikobina dan defendan-defendan dalam tindakan ini dan dengan menggunakan usaha yang munasabah bolehlah memohon dalam tindakan pertama, relief yang sedang dituntutnya dalam tindakan ini. Jadi, plaintif semestinya terhalang daripada membawa tindakan ini.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-588-90.]

Cases referred to

1 *Yat Tung Investment Co Ltd* v *Dao Heng Bank Ltd & Anor* [1975] AC 581 (refd)
2 *Carl Zeiss Stiftung* v *Rayner & Keeler Ltd & Ors* [1976] 1 AC 853 (refd)
3 *Gleeson* v *J Wippell & Co Ltd* [1977] 3 All ER 54 (refd)
4 *Superintendent of Pudu Prison & Ors* v *Sim Kie Chon* [1986] 1 MLJ 494 (refd)
5 *Brisbane City Council and Myer Shopping Centres Pty Ltd* v *A-G for Queensland* [1979] AC 411 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19

Lee Fei Fung (Miss) and subsequently *Wong Kim Fatt* for the plaintiff.

M Nagarajah for the defendants.

Cur Adv Vult

Richard Talalla JC: On 25 August 1987 Mensa Mercantile (Far East) Pte Ltd ('Mensa') commenced action ('the first action') in the High Court at Kuala Lumpur against Eikobina (M) Sdn Bhd ('Eikobina') claiming specific performance of an agreement dated 6 May 1987 whereunder Eikobina agreed to sell and Mensa to buy certain construction equipment for a consideration of Japanese Yen 92,500,000. Mensa also claimed general damages for breach of contract. Eikobina served a defence and counterclaim in the first action. It was dated 9 January 1988 and amended on 3 September following wherein they pleaded that time was of the essence of the agreement and that the plaintiff had failed to pay the purchase price within the stipulated time and by such conduct had evinced an intention no longer to be bound by the agreement and had repudiated the same.

At the trial of the first action there was adduced in evidence by Eikobina a letter dated 15 August 1987 from Eikobina's solicitors to Mensa's solicitors informing the latter that Eikobina had sold the equipment to Edogawa Shuseki Centre Co Ltd ('Edogawa').

Mensa's chief executive officer, one Mr Derrick Ong, gave evidence in the first action confirming that Eikobina's solicitors had informed him of the sale to Edogawa. He testified that he made a company search and discovered that the directors of Edogawa were the same as the directors of Eikobina and that one Mr Hirose Katsumi was chairman and director of the defendant company. He added that after he had been informed that the equipment had been sold to Edogawa he asked his solicitors to sue for specific performance which of course they did against Eikobina but not the defendants in this action. Mr Katsumi testified for the defence. He gave evidence to the effect that the equipment belonged to Fuji Sangyo Pte Ltd ('Fuji') and that Eikobina was the Malaysian agent of Fuji. He also testified that he was the owner of both these companies and added that he was a shareholder of Edogawa owning 80% of that company and controlling it.

Judgment in the first action was delivered on 2 February 1989. The learned judge found that Eikobina had breached the agreement. Her Ladyship then posed the question whether Mensa could succeed on its plea to have the agreement specifically enforced. The judge said that Mensa was required to establish that the equipment was not easily available in the market and as such was of unique interest and value to it. The learned judge found that Mensa had not discharged the onus of so establishing and on that ground alone her Ladyship considered that damages were an adequate remedy for Eikobina's breach and gave judgment for damages for breach of agreement.

On 19 November 1988 Mensa commenced this action here in the High Court at Johore Bahru against Eikobina, Fuji and Edogawa wherein Mensa pleaded that Eikobina, Fuji and Edogawa had common directors and/or shareholders, referred to the said agreement, explained that Eikobina refused to perform the agreement referred to the first action and went on to plead that in the course of the trial of that action Eikobina's witnesses gave evidence that the equipment did not belong to Eikobina but to Fuji and that Eikobina purported to sell the equipment to Edogawa. Mensa went on to aver that these facts were not pleaded in the defence in the first action, but not the reason for not doing so. Mensa went on to plead that the purported sale which had not been carried out was a fake or a fraud made with the intention or purpose of preventing Mensa from enforcing specific performance against Eikobina and that Eikobina, Fuji and Edogawa had conspired to cheat or deceive and had thereby caused loss and damage to Mensa. Mensa claimed in this action an injunction restraining the three defendants by themselves their servants or agents from moving the equipment from their then location in Malaysia and a declaration that the agreement and sale of the equipment was null and void and damages for conspiracy.

The defendants applied pursuant to the provisions of O 18 r 19 of the Rules of the High Court 1980 and under the court's inherent jurisdiction for an order that the writ and statement of claim herein be struck out as scandalous or frivolous or vexatious or as being otherwise an abuse of the process of the court and that they

disclosed no reasonable cause of action, as the case may be. In particular the defendants sought to set aside the writ and statement of claim because, so they claimed, this action was res judicata in the 'wider sense'. Counsel for the defendants cited the Privy Council case of *Yat Tung Investment Co Ltd* v *Dao Heng Bank Ltd & Anor*[1] where Lord Kilbrandon, delivering the judgment of their Lordships, said in regard to the doctrine of res judicata at p 590 as follows :

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram VC in *Henderson* v *Henderson* (1843) 3 Hare 100, 115 where the judge says :
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> '...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under certain circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. This plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'.

In *Carl Zeiss Stiftung* v *Rayner & Keeler Ltd & Ors*[2] Lord Guest, after stating that the principle of res judicata has developed so as to extend to what is now described as 'issue', said at p 935 :

> The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and , (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

However, for the doctrine of issue estoppel to apply, there must also be privity of interest between the defendant in the first action and the defendants in this action. As in the case of *Gleeson* v *J Wippel & Co Ltd*[3] the question that arises is the meaning of 'privity' in this context. In that case Meggary V-C said at p 59 :

> The requisite privity is said to be a privity either of blood, of title, or of interest: see *Carl-Zeiss-Stiftung* v *Rayner and Keeler Ltd*, per Lord Reid. Plainly there is no question of blood or title in this case, and so only privity of interest can be in question. One difficulty about this is the protean nature of the word 'interest', a term which at times seems almost capable of meaning all things to all men. Another difficulty is that, as Lord Guest pointed out in *Carl-Zeiss-Stiftung* v *Rayner and Keeler Ltd*, 'there is a dearth of authorities in England on the question of privies'. From such authorities as there are, it is by no means easy to distil any principle. In *Mercantile Investment and General Trust Co* v *River Plate Trust, Loan & Agency Co* a plaintiff had sued an American company. Under an indemnity given to that company by an English company the English company assisted the American company in the litigation and paid its costs. The plaintiff won, and then sued the English company, contending that the English company was really the defendant in the first action, and so was estopped from disputing the plaintiff's claim. Romer J, however, rejected this contention; and in *Carl-Zeiss-Stiftung* v *Rayner and Keeler Ltd* Lord Reid's reference to this decision was certainly not in terms of disapproval. The fact that there would be an estoppel as between the indemnifier and the indemnified does not produce an estoppel and quoad third parties. In that respect, an agreement to indemnify creates no privity.
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> It has also been held that judgment against A in one capacity does not bind him in another capacity. Thus a finding of negligence against him in proceedings in which he is concerned in his personal capacity does not bind him in proceedings in which he engages in his capacity as his wife's personal representative: *Marginson* v *Blackburn Borough Council*. Again, if A purports to act as agent for B, and the plaintiff then successfully sues A for breach of warranty of authority, B cannot be regarded as privy to A in those proceedings: *Carl-Zeiss-Stiftung* v *Rayner and Keeler Ltd*. In that case Buckley J said that he hd been referred to – 'no authority which indicates at all clearly what kind of interest in earlier litigation relied on as constituting as res judicata is sufficient to render someone who was not a party, and is not a successor in title to a party to that litigation, privy to a party for the purpose of the doctrine.'
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> Privity for this purpose is not established merely by having 'some interest in the outcome of litigation'. So far as they go, I think these authorities go some way towards supporting the contention of counsel for the plaintiff that the doctrine of privity for these purposes is somewhat narrow, and has to be considered in relation to the fundamental principle *nemo debet bis vexari pro eadem causa.*

It has been stated in the Supreme Court that even where res judicata is not strictly established or where estoppel per rem judicatam has not been sufficiently pleaded or made out but nevertheless the circumstances are such as to render any reagitation of the question formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action. See the judgment of Abdoolcader SCJ in *Superintendent of Pudu Prison & Ors* v *Sim Kie Chon*,[4] wherein his Lordship considered that it would suffice in that regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd* v *A-G for Queensland*.[5]

Upon a perusal of the pleadings and the evidence led in the first action and the pleadings, affidavit evidence and argument of counsel in this action and particularly in view of the fact that Mensa's chief executive officer knew that the equipment had been transferred to Edogawa and the director of the two companies were the same, I consider that there is privity of interest between the defendants in this action and Eikobina the defendants in the first action to the end that Mensa should be precluded from bringing this action and in this regard I place reliance on the cases referred to

above. Mensa in answer to the defendants' application offered this court no reason why it (Mensa) could not with reasonable diligence have claimed in the first action the relief it was claiming against the defendants in this action. On the evidence before me it was clear that Mensa at the time material to the first action knew of the nexus between Eikobina and the defendants in this action and by exercising reasonable diligence could have sought in the first action the relief it was claiming in this action. It seemed to me that Mensa having claimed but failed to obtain specific relief in the first action was seeking a proverbial second bite of the cherry in this action.

Accordingly the defendants' application for an order that the writ and statement of claim be struck out is allowed with costs to be taxed.

Application allowed.

Solicitors: *Gulam & Wong; Shook Lin & Bok.*

Reported by *Zarinah Marican*

Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd

HIGH COURT (BORNEO) — ORIGINATING SUMMONS NO 150 OF 1988
SYED AHMAD IDID JC
12 NOVEMBER 1990

Land Law — Sale and purchase agreement — Registered owner executed memorandum of transfer in favour of purchaser — Payment of full purchase price — Release of title deed to purchaser's solicitor — Registered owner has divested himself of all beneficial interest in land and vests it in bona fide purchaser — Registered owner becomes trustee for purchaser

Trusts and Trustees — Native land — Registered owner holding native land as trustee for company — Whether trust is illegal — Native title has been converted to country lease title — Registered owner has executed memorandum of transfer in favour of purchaser who had paid full purchase price and was given possession of title deeds — Sabah Land Ordinance, ss 17(1), 88 & 95

Contract — Illegality — Native land held by registered owner as trustee for company — Company applied for conversion of native titles to country lease titles and subdivision — Sale and purchase agreement in respect of native land was entered between company and purchaser — Whether agreement is illegal — Approval for conversion and subdivision — Agreement was made with a view of sale after issue of subdivided title — Sabah Land Ordinance, s 17(1)

Two pieces of native land were registered in the name of DD as trustee for PD Sdn Bhd. PD Sdn Bhd applied for conversion of the native titles to country lease titles and for their subdivision so as to build shophouses. Sale and purchase agreements in respect of the shophouses were entered between PD Sdn Bhd and 29 purchasers. Approval for the conversion of the native titles to country lease titles was obtained. Subsequently, upon PD Sdn Bhd's application, the plaintiffs granted end-financing facility to the 29 purchasers. The 29 purchasers then entered into loan agreements cum assignment with the plaintiffs. Pending the issue of subdivided country lease titles, PD Sdn Bhd executed memorandum of transfer in escrow in favour of the 29 purchasers. The 29 purchasers also simultaneously executed memoranda of charge in escrow in the plaintiff's favour. Upon the issue of the subdivided country lease titles in the name of DD, PD Sdn Bhd so as not to incur additional costs, arranged for direct transfer from DD to the 29 purchasers. DD then executed fresh memoranda of transfer in escrow in favour of the 29 purchasers. All the 29 subdivided title deeds had been released to the common solicitors for both the plaintiffs and the purchasers in order to effect the registration of the transfers and the charges. The full purchase price had been settled. Out of 29 subdivided title deeds, 22 had been transferred to the purchasers and had been charged in favour of the plaintiffs. The transfer in respect of the other seven title deeds were held back by prohibitory orders which were entered by the defendants, the judgment creditors of DD. The plaintiffs applied to set aside the prohibitory orders.

Held, allowing the application:

(1) A registered owner by executing a memorandum of transfer or upon receipt of the purchase price in full, had divested himself of all beneficial interest in the land and vested it in the bona fide purchaser. The registered owner becomes a bare trustee for the purchaser.

(2) The contention that the trust relationship between DD and PD Sdn Bhd was void and unenforceable for breaching s 17(1) of the Sabah Land Ordinance, is not substantiated. DD had executed memoranda of transfer in favour of the purchasers who had paid the full purchase price and were given possession of the title deeds.

(3) Upon reading cl 12 of the sale and purchase agreements, the agreements were made with a view of sale after the issue of the subdivided titles. Hence the agreements are not contrary to the Ordinance.

(4) The courts are inclined to observe the principles of equity in the protection of the little individual, the purchaser, as against big institutions or financiers which are perceived as being able to withstand the loss, if any.

[Bahasa Malaysia summary

Dua bidang tanah orang asli telah didaftarkan dalam nama DD sebagai pemegang amanah bagi PD Sdn Bhd. PD Sdn Bhd memohon penukaran hakmilik orang asli kepada hakmilik pajakan desa dan bagi pecah lot supaya dapat membina rumah-rumah kedai. Perjanjian jualbeli berkenaan rumah-rumah kedai dimasuki antara PD Sdn Bhd dan 29 pembeli-pembeli. Kebenaran pertukaran hakmilik orang asli kepada hakmilik pajakan desa diperolehi. Kemudiannya, atas permohonan PD Sdn Bhd, plaintif memberi kemudahan pembiayaan akhir kepada 29 pembeli. Pembeli-pembeli itu lalu memasuki perjanjian pinjaman dan menyerahhak dengan plaintif. Sementara menunggu pengeluaran hakmilik pajakan desa yang telah dipecah lot, PD Sdn Bhd menandatangani memoranda pindahmilik hak dalam eskrow bagi faedah 29 pembeli-pembeli juga. Pembeli-pembeli juga pada masa yang sama menandatangani memoranda gadaian dalam eskrow bagi faedah plaintif. Apabila hakmilik pajakan desa dikeluarkan dalam nama DD, PD Sdn Bhd telah mengatur untuk pindahmilik terus daripada DD kepada 29 pembeli-pembeli supaya kos tambahan tidak ditanggung. Kemudiannya, DD menandatangani memoranda pindahmilik dalam eskrow yang baru bagi faedah 29 pembeli-pembeli. Kesemua 29 suratan hakmilik yang telah dipecah lot